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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D7

[REDACTED]

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 19 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

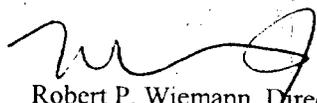
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to employ the beneficiary temporarily in the United States as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of California engaged in plastics manufacturing, seeks to employ the beneficiary as a purchasing and material control specialist. The petitioner claims to be the subsidiary of [REDACTED] located in Kyung-buk, Korea.

The director denied the petition concluding that the business entity in the United States was not a qualifying organization as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G) and as required under 8 C.F.R. § 214.2(l)(3)(i). Specifically, the director found that the minimal evidence of the petitioner's business dealings in the United States suggested that it was not doing business as defined by the regulations, and thus was unable to meet the definition of a qualifying organization. In addition, the director concluded that the petitioner had failed to establish that it had sufficient premises to house its manufacturing business.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director's basis for denial was erroneous since it focused on the small size of the petitioner and not its actual business functions. In addition, counsel alleges that the sales activity conducted by the petitioner established that the petitioner was doing business as defined by the regulations. Finally, in the alternative, counsel alleges that the petitioner was unfairly punished for maintaining a conservative business plan, and that overall, it meets the definition of a qualifying organization. In support of these contentions, counsel for the petitioner submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in this matter is whether the petitioner is a qualifying organization as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the regulation defines the term "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Since the evidence of record indicates that the petitioner is a wholly-owned subsidiary of the foreign parent, the director focused on the second criteria above; namely, whether the U.S. entity is or will be doing business. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in manufacture of plastic, and specifically states that it produces plastic parts and components used in the electronic consumer product industry. In support of the petition, the petitioner submitted its lease agreement for 225 square feet of office space (which had expired on June 30, 2001), as well as a financial statement for the U.S. entity, showing net sales of \$1,854,380 for the first three quarters of 2001. The director found this initial evidence to be insufficient, and consequently issued a request for additional evidence on December 20, 2001. The director requested additional documentation pertaining to the petitioner's business, including a business license, invoices, and an updated lease agreement. In a response dated February 20, 2002, the petitioner submitted the requested documentation, and in an accompanying cover letter counsel indicated that the U.S. petitioner was merely a sales office for the foreign parent's manufacturing business. Counsel further explained that the intended purposes of the beneficiary's U.S.

employment was to expand the U.S. office and hire new employees.¹ Finally, counsel stated that although the petitioner's ultimate intention was to have production and manufacturing operations in the United States office, they were not currently engaged in such operations.

Accompanying counsel's letter were numerous documents, including: (1) the petitioner's business license; (2) three invoices, dated December 3, 2001 and December 4, 2001 and showing approximately \$11,600 in sales; and (3) a letter from the petitioner's landlord confirming the extension of the commercial lease until June 30, 2002.

After reviewing this additional evidence, the director denied the petition. The director concluded that the petitioner had failed to submit sufficient evidence to establish that it had been or would be doing business as a plastics manufacturer. Specifically, the director noted that the three invoices submitted in support of its alleged manufacturing business did not show that the petitioner had been continuously and systematically providing goods or services. In addition, the director noted that the photographs submitted by the petitioner corroborated the small amount of square footage listed on the lease agreement, compelling the director to find that the petitioner had not secured adequate premises for its intended business operations.

On appeal, counsel for the petitioner discusses the nature of the petitioner's business, and contends that the director's decision unfairly prejudiced the petitioner for being a small company still in its start-up phase. They note that although established in March of 2000, the U.S. petitioner is still a relatively new business in its development stage. Despite this relatively new status, however, counsel refers to the nearly \$2 million in net sales that it allegedly transacted for the first three quarters of 2001. Counsel, however, provides no supporting documentation, such as invoices, to supplement the sales figure featured on the financial statement provided.

On review of the evidence submitted, the AAO concurs with the director's finding that the petitioner failed to demonstrate that it had been and will be doing business, and thus, by definition, is not a qualifying organization for purposes of this analysis. First, in the course of examining whether the petitioning company has been doing business as a plastics manufacturer, it is reasonable to expect copies of documents that are required in the daily operation of the enterprise, such as invoices and shipping receipts. Any company that is doing business through the regular, systematic, and continuous provision of goods or services may reasonably be expected to submit copies of these invoices evidencing the amount of sales actually done.

Other than the three invoices previously discussed, there is no additional documentation existing in the record to establish that the petitioner has been engaging in the sale of plastic goods as it claims in the petition and again on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, without documentary evidence to support his claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534

¹ Since the corporate documentation submitted with the petition indicated that the U.S. entity was incorporated on March 24, 2000, the director noted that the U.S. entity was not eligible for consideration as a new office, since it had been in business for nearly two years prior to the petition's filing.

(BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel submits for the first time a large stack of invoices dating from December 3, 2001 through January 31, 2002. This evidence is unacceptable for two reasons. First, the petition in this matter was filed on December 3, 2001. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Since almost all of the invoices submitted were submitted *after* the petition was filed, they are not acceptable. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. at 534. The appeal will be adjudicated based on the record of proceeding before the director.

Finally, in the event that the invoices were accepted as evidence, counsel overlooks the fact that these invoices represent, at best, a two-month series of business activity. There is no additional evidence of the petitioner's alleged business operations prior to this time period, which therefore makes it impossible to conclude that the petitioner had been regularly and systematically engaged in the provision of goods and services. The definition of doing business clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing its business activities for the remainder of the first year. On appeal, counsel fails to address this pertinent issue, but correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a nonimmigrant intracompany transferee with specialized knowledge. However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In the present matter, the evidence submitted is insufficient to establish that the petitioner has been doing business as defined by the regulations. Therefore, the petitioner cannot be deemed a qualifying organization under 8 C.F.R. § 214.2(l)(3)(i).

The next issue in this matter is whether the petitioner has secured sufficient physical premises in which to house the new organization. The regulation at 8 C.F.R. § 214.2(l)(3)(vi)(A) provides that if the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a *new office*, the petitioner shall submit evidence that sufficient physical premises to house the new office have been secured. Upon review of the record of proceeding, the AAO disagrees with the basis for the director's finding in this matter. The petitioner has been incorporated since March 24, 2000. Consequently, the petitioner cannot be deemed a new office. Since the beneficiary was not intended to come to the United States to open a new office or be employed in a new office, the regulatory requirement set forth above is inapplicable, and the director's comments with respect to this issue will be withdrawn.

Beyond the decision of the director, the record as presently constituted is not persuasive in demonstrating that the beneficiary is to perform a job requiring specialized knowledge in the proffered position. Although the petitioner asserts that the beneficiary's position requires specialized knowledge, the petitioner has not articulated any basis to the claim that the beneficiary is employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's job duties, the beneficiary has not identified any aspect of the beneficiary's position which involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests. The petitioner has not submitted any evidence of the knowledge and expertise required for the beneficiary's position that would differentiate that employment from the position of "purchasing/material control specialist" at other employers within the industry. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.